No. 75-926

Supreme Court, U. S.
FILED
APR 26 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM 1975

PHILLIP ELWON WALTERS,

Appellant,

v.

THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-926

PHILLIP ELWON WALTERS;
Appellant,
v.
THE STATE OF CALIFORNIA,
Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves this Court to dismiss the appeal herein for lack of jurisdiction or in the alternative to affirm the judgment of the California Court of Appeal, Fourth Appellate District, Division Two on the ground the questions presented by the appeal are insubstantial and do not warrant further argument.

OPINIONS BELOW

On July 9, 1975, the California Court of Appeal, Fourth Appellate District, Division Two, issued an unpublished opinion in case 4 Crim. 6474 affirming appellant's four convictions for kidnapping for ransom where the victims suffered bodily harm (Penal Code section 209). A copy of this opinion appears as Exhibit B of appellant's brief.

JURISDICTION

Appellant asserts jurisdiction under 28 U.S.C. 1257(2). However, jurisdiction does not lie under this section. (See Argument I, infra.)

STATEMENT OF THE CASE

An indictment returned by the San Bernardino County Grand Jury on October 31, 1973, charged Phillip Walters, Edward Montoya, and Norbert Meier, with four counts of murder (Penal Code section 187) and four counts of kidnapping for purposes of ransom (Penal Code section 209). Each of the four kidnapping counts further alleged each of the four victims had suffered bodily harm. (CT 1-6.)

Thereafter, appellant and the others were arraigned and entered not guilty pleas. (CT 7, 23.)

On November 29, 1973, the court issued a protective order to prevent unfair publicity from prejudicing the defendants' rights. (CT 42-46.) On December 3, 1973, defendants' change of venue motions were denied. (CT 47.) On the same day the court denied defendants' motions for separate trials, and a motion to dismiss by Meier and Montoya. (CT 48.) Although it is unclear from the record, appellant Walters' motion to dismiss apparently was also denied on December 10, 1973. (CT 63.)

After renewed motions for change of venue and separate trials were denied and objections to security procedures were overruled, a jury was selected. (CT 66-94.) Following trial by jury (CT 95-226), Meier and Montoya were found guilty of four counts of first degree murder, and all three defendants

were found guilty of four counts of kidnapping for the purpose of ransom wherein the victims had suffered bodily harm. Appellant Walters was acquitted of the murder charges. (CT 227-233, 312-347.)

On April 10, 1974, defendants were sentenced to state prison for the term prescribed by law and all sentences were to be served concurrently. (CT 360-362, 374-379.)

On July 9, 1975, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed appellant's conviction in an unpublished opinion in case 4 Crim. 6474. (AOB Exh. B.)[1]

On September 4, 1975, the Supreme Court of California denied appellant's request for a hearing. (AOB Exh. C.) He filed Notice of Appeal to this Court on November 13, 1975, asserting jurisdiction pursuant to 28 U.S.C. 1257(2). (AOB Exh. F.)

STATEMENT OF FACTS

1. Prelude

During July of 1973, Martha Evans was in San Bernardino in order to speak to her mother about obtaining a divorce from her husband. Her husband was stationed in the San Bernardino area and owned a green 1969 Plymouth Roadrunner. While in San Bernardino, she met Norbert Meier, and they began dating. About July 15, 1973, she and Meier went to visit Dorothy Sanchez. Mrs. Sanchez was Meier's wife, but both parties were contemplating a divorce. (RT 1541-1557.) On another occasion

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1. AOB refers to appellant's opening brief before this Court.

Meier took Mrs. Evans up to Lake Gregory for a hike and to Lost Lake. On these trips they went in his Plymouth Roadrunner. (RT 1558-1568.)

Sometime after Mrs. Evans returned to her home in Fresno, Meier came up to Fresno to live with her. Around October 7, 1973, Edward Montoya came to Fresno and met Mrs. Evans. (RT 1651-1652, 1571-1574.) On one occasion during the week of October 7, 1973, Meier mentioned he wanted to see his wife during the coming weekend. (RT 1575-1578.) Meier also told Martha he was going to be free of Dorothy Sanchez before Martha would be free of her husband. (RT 1578.)

On Thursday October 11, 1973, Montoya was at the residence of Mrs. Evans, talked about a gun, and mentioned killing someone. He also indicated he was good with knives and talked about being rich some day. (RT 1580, 1583, 1588, 1591, 1673.)

When Mrs. Evans came home from work at 3:30 p.m. on October 12, 1973, she noted her Roadrunner was missing. (RT 1592, 1599-1600.) As she entered her apartment she found someone had ransacked the apartment. (RT 1601.) She also found some paper with defendant Meier's handwriting on it. (RT 1601-1605.) Mrs. Evans further noted some linen, towels, soap, cleaners, gloves, masking tape, and surgical tape had been taken. (RT 1622.) A pair of scissors, a kitchen knife, some razor blades, and three pair of surgical gloves were also missing. (RT 1622-1624, 1628.)

2. <u>The Last Hours of the Victims</u>

On Sunday October 14, 1973, Meier and Montoya were seen at a market in the Crestline area between 4:00 and 5:00 p.m.

(RT 1903-1917.) When they left the store they were seen driving away in a white Chrysler. (RT 1917-1924.)

On October 14, 1973, Mrs. Dorothy Sanchez was living in a house on Grand Terrace Road in Colton with her two children. Toni Sanchez, her daughter, was fifteen, and David Sanchez, her son, was thirteen. (RT 88-103, 146.) On that afternoon, John McGrail, nineteen, a friend of the family, was seen playing baseball with David in the Sanchez yard. (RT 104-105.) A neighbor also saw Mrs. Sanchez out in the yard on a few occasions that afternoon. (RT 106.) The Sanchez family and McGrail were never seen alive again.

About 11:00 or 11:30 p.m. that evening one of the Sanchez' neighbors to the west was awakened by the barking of his dogs. He got up, looked outside, and observed the tail-lights of a car moving west down the street. He also saw a dark colored car near the Sanchez home. (RT 107-121, 101.)

Sometime around midnight a neighbor of the Sanchez' to the east was awakened by the barking of her dog. She looked outside, did not see anything, and went back to bed. However, sometime later she heard screams coming from the Sanchez house and again looked outside to investigate. She also noted the lights were on in the Sanchez house and a big black dog she had never seen was by the house. She also saw a white car parked by the Sanchez house which she had not seen before. (RT 143-160, 175-177, 1953.)

3. <u>Leaving the Ransom and the Capture</u>

On Monday October 15, 1973, at about 9:00 a.m., Betty Ponce, the mother of Dorothy Sanchez, received a phone call. The caller

asked her if she had a daughter named Dorothy Sanchez and grandchildren named Toni and David Sanchez. The caller then indicated he was holding Dorothy and the children as hostages and she would never see them alive again unless she brought $7,000 to Seventh and Waterman. Mrs. Ponce felt it was a crank call, told the man on the line he was crazy, and he hung up. She knew Meier since he had been married to her daughter, but she did not recognize his voice on the phone. Mrs. Ponce told her husband about the call, and he went over to Mrs. Sanchez' house to see if everything was all right after learning Dorothy had not gone to work that day. (RT 369-381, 217-218.) Meanwhile Mrs. Ponce had also notified the sheriff's office before Mr. Ponce left the house and they began a preliminary investigation into the possible kidnapping of the Sanchez family. (RT 218, 254-260.)

About 9:30 a.m., Mr. Ponce arrived at the Sanchez home, found the front screen door and regular door were ajar, observed bloodstains in various portions of the house, and found broken glass in the living room. (RT 222-248.) After checking inside the house, he phoned his wife who then called the sheriff's department. (RT 248, 382.)

Lieutenant Forbush, of the San Bernardino Sheriff's Department, accordingly dispatched some deputies to the area of Seventh and Waterman, arranged for a telephone trap on the Ponce's phone, and went to the Ponce residence with two other officers. (RT 266-274.)

A little later that morning Mrs. Ponce received another call directing her to bring the money to Baseline and Waterman instead of Seventh and Waterman. She noted the man at the other end of the line sounded as if he was of Mexican descent. (RT 391-393.)

The sheriff's office brought $3,000 for Mrs. Ponce since she did not have enough money to meet the kidnapper's demands. The money was placed in a paper sack, and Mrs. Ponce drove to her bank to obtain the rest of the money needed. Lieutenant Forbush hid in the rear floor area of the car under a blanket. (RT 274-275, 285-287.) They then drove to the intersection of Baseline and Waterman. (RT 393-394.)

Around 11:30 a.m. to 12:30 p.m., Meier and Montoya were observed in the green Roadrunner belonging to Martha Evans in the vicinity of Baseline and Waterman. (RT 1059-1066, 1546-1548.)

Around noon, Mrs. Ponce's sister received a call at the Ponce house. (RT 588.) The caller asked her if she had the money and told her to come to Baseline and Waterman where there were two phone booths. Mrs. Ponce's sister told the caller Mrs. Ponce had gone to the bank and the caller said, "'Well, we'll wait there. Bye.'" (RT 600.) The sheriff's department was able to trace the call to a public phone at 1303 North Waterman. (RT 602.) The phone was in a booth near the intersection of Wabash and Waterman which is one block north of the intersection of Baseline and Waterman. (RT 632, 279-280.)

At about 12:07 p.m., Mrs. Ponce arrived at Baseline and Waterman, got out of her car, and placed the $7,000 under one of the phone booths on the northeast corner. (RT 394-398, 776-780.) After completing this task, she left the intersection and went home. (RT 781, 295-296, 398.) When she got home she received another call at 12:53 p.m. from the man who had phoned earlier and was instructed to return to Baseline and Waterman and get the money. (RT 398-401, 592, 603-604.) This call came from 306 W. Baseline. (RT 605.)

Before returning to the area, Mrs. Ponce and Forbush stopped near the office of the Department of Motor Vehicles to obtain the $7,000 from other officers. The money had been recovered after someone, uninvolved in the kidnapping plot, had removed it from the phone booth. (RT 304-305, 402-403, 424-430.)

At 1:02 p.m., Meier and Montoya were observed at a phone booth at 1303 Waterman near the intersection of Wabash and Waterman. During the next ten or eleven minutes Montoya was observed making phone calls while Meier twice walked to a position where he could look down the street at the phone booth at the intersection of Baseline and Waterman. (RT 431-432, 631-633, 736-739, 752-753, 901-910.)

Meanwhile, after Mrs. Ponce obtained the money, she returned to the phone booth at Baseline and Waterman and placed the money in the phone booth at about 1:07 p.m. She then stayed near the phone booth, and the phone rang a few moments later. When she picked up the phone, a voice instructed her to take the money to 40th and Sierra Way in San Bernardino. (RT 792-793, 404, 311-313.) In accord with these instructions, Mrs. Ponce obtained the money from the booth and she and Officer Forbush proceeded to 40th and Sierra Way. (RT 312-319, 405-407.)

During this period, Meier and Montoya left the phone booth, and drove off in the green Roadrunner automobile belonging to Martha Evans. (RT 443, 451-452, 1634.) About 1:21 p.m. the Roadrunner was seen passing the intersection of 40th and Sierra Way while Mrs. Ponce was also seen driving through the intersection. As the Roadrunner drove by, Meier and Montoya looked at the phone booths on the northeast corner of the intersection. (RT 799-807.)

About 1:33 p.m. Meier and Montoya stopped at a Mobil gas station on Waterman south of the Highway 18 freeway, and Montoya made a phone call from a booth at that location. (RT 648-649, 651-660.) At this time, Mrs. Ponce received a phone call at the booth on 40th and Sierra Way. The caller asked her if she had the money, and she said she did. The caller instructed her to put the money in a shopping basket behind the Standard Station near the Alpha Beta shopping center at Baseline and Arrowhead. (RT 859-860, 325-327, 408-411.)

Mrs. Ponce and Forbush went to the shopping center, deposited the money in a shopping cart by the gas station at about 1:48 p.m. in accord with instructions, and went back to her house. (RT 413-414, 327-338, 485-487.)

While Mrs. Ponce was placing the money in the cart, Meier had been sitting on a bench in front of the Alpha Beta store. After she left, Meier and Montoya were seen walking around the shopping center and on the streets near the intersection. (RT 488-492.) They were observed sitting together in front of the market at about 1:52 p.m. (RT 492.)

Shortly after 2:00 p.m., Meier and Montoya left the area in the Roadrunner and drove to a phone booth on Mt. Vernon north of 16th Street. (RT 665-669.) At 2:13 p.m., Montoya entered the phone booth and made a phone call. (RT 680-682, 740, 763-764.) He left the booth about three minutes later. (RT 764.)

About this time Mrs. Ponce received a call, and the voice directed her to go to the Lake Gregory area near Crestline, California. The call was traced to a phone booth on the 1600 block of Mt. Vernon. (RT 593, 606, 608.)

At about 2:30 p.m., Meier and Montoya returned to the shopping center at Arrowhead and Baseline and parked by the Standard Station near the intersection. (RT 685.)

At 2:30 p.m., appellant Walters was observed walking east behind the Standard Station near the shopping center. (RT 499-500, 833-834.) As he was walking, he kept looking around him. (RT 834.) Appellant continued walking around the area and looking around, looked at the basket with the bag of money, and did more walking and looking around the area. After appellant walked around the area a few more times and looked at the basket again, he picked up the bag of money, opened it, checked the contents, and walked over to a white Chrysler. (RT 835-840, 501-502.) After passing the rear of the vehicle, he looked all around the parking lot, briskly walked to the back of the vehicle, put the bag in the trunk, closed the trunk, and drove off. (RT 840-841.)

Moments later, Meier and Montoya were observed walking toward the Plymouth Roadrunner parked in the lot at the shopping center. (RT 844-845.) Meier was about 25 to 30 feet from the Roadrunner while Montoya was about 25 to 30 feet from the other side of the car. At this time Meier waved his hand at Montoya, both men entered the car, and drove away. (RT 846-848.) Sheriff's officers followed defendants for awhile and eventually arrested them. (RT 511-519.)

Meanwhile, other officers followed appellant Walters. While following him, they noted he was looking at a map. Walters ultimately stopped on Fifth Street between "G" and "H" Streets and was arrested shortly thereafter. Afterwards, officers opened the trunk of the Chrysler and found the bag with

the money inside. (RT 985-986, 1000-1005, 1031-1040, 1230-1233.) A map was also found inside the car, and it had a circle around the intersection of Baseline and Arrowhead. (RT 1124-1125.)

4. The Investigation of the Sanchez Home and the Roadrunner

An investigation of the Sanchez home revealed numerous bloodstains in the various rooms of the house. Officers also found some notes in the bedroom of Toni Sanchez. One of the notes began with the words, "'Grandma and Grandpa'", and ended with "'Not less than five thousand.'" Another note had a hand printed message. The first words were "'Dear'" and "'Graranda'", and the last markings were "7" and "'thoua.'" A bloodstained towel, bloodstained adhesive tape, and a bent bloodstained knife were found. An iron was also found with a missing cord. (RT 1144-1148, 1295-1301, 1318-1348, 1262-1264.)

The Roadrunner contained numerous bloodstains and vomit stains. A child's panties, rubber gloves, and scissors were found in the car. A floor mat was missing from the vehicle. (RT 1372-1382, 1386-1398, 1408-1422.)

It was ultimately determined the bloodstains on the living room floor contained the blood of John McGrail or defendant Meier. (RT 1985, 2053-2054, 2982.) The carpet padding from the left rear of the Roadrunner contained the bloodstains of appellant Walters, John McGrail, or Toni Sanchez. (RT 1995, 2055, 2982.) Carpeting and upholstery in the Roadrunner contained the bloodstains of either Dorothy Sanchez, Toni Sanchez, or John McGrail. (RT 2055-2056.)

An examination of the writing of Meier and Toni Sanchez with the notes found

at the Sanchez home revealed two of the notes had been written by Toni Sanchez and a third note had been written by Meier. (RT 1829-1846; People's No. 63.)

5. The Fate of the Victims

On October 16, 1973, at 6:30 p.m., officers went to the Lost Lake area of the San Bernardino Mountains and found the bodies of Dorothy Sanchez, Toni Sanchez, David Sanchez, and John McGrail. (RT 1713-1715.)

Dorothy Sanchez was wrapped in a blanket, and her body was tied at the knees and the neck by belts. (RT 1715-1720.) David Sanchez was found with an appliance cord wrapped around his neck twice. The cord was knotted by his throat. (RT 1724.) An officer also noted David's hands had been taped together with adhesive tape and another piece of tape was in his hair. (RT 1725.) John McGrail was found wrapped in a sleeping bag with a gaping slash wound from one side of his neck to the other side. (RT 1726.) Toni Sanchez was found nearby and there were extensive bloodstains on the ground near her body, on her body, and on her clothes. (RT 1728-1736.) A knife blade and handle and a rubber mat were also found near the bodies. (RT 1740-1741.)

A pair of scissors was found near the body of Toni Sanchez, a bloodstained bat was located 90 feet from the body of Dorothy Sanchez, and a rock with possible bloodstains was found nearby. (RT 1780-1781, 1790, 1793.) It was later determined the left front tire and rear tires of the Roadrunner may have made the tire prints found in the general vicinity of the bodies. (RT 2085-2109.)

The bodies of the victims were later examined. (RT 2207-2222.) Dorothy Sanchez

died from cerebral bruises and hemorrhage as a result of injuries to the face and head causing skull fractures. (RT 2266-2267.)

David Sanchez was strangled to death by the cord found wrapped around his neck. (RT 2279.) John McGrail died from stab wounds to the lung, an extensive incision wound in the neck, and a blow to the head. (RT 2323-2324.) The neck wound could have been caused by the kitchen knife found at the Sanchez home which had been taken from the residence of Mrs. Martha Evans. (RT 2284, 1624, 1347-1348.) Toni Sanchez died due to laceration or tearing of the brain and hemorrhage caused by skull fractures. The injuries may have been caused by a baseball bat. (RT 2340-2346.)

QUESTIONS PRESENTED

1. Whether the purported appeal pursuant to 28 U.S.C. 1257(2) should be dismissed when the California courts did not rule on the validity of Penal Code section 209 under the United States Constitution.

2. Whether the decision of the California Court of Appeal, Fourth Appellate District, Division Two should be affirmed when appellant has presented no issues raising substantial federal questions on this appeal.

A. Whether appellant was deprived of due process when he was convicted of violating Penal Code section 209 and there is ample evidence supporting his conviction.

B. Whether appellant was deprived of due process when the prosecutor failed to disclose evidence which was unrelated to the case against appellant to the Grand Jury.

C. Whether appellant was deprived of due process because the trial court did not grant his request for a change of venue when there was no reason for the trial court to grant such a request.

D. Whether appellant was deprived of due process because guards were in the courtroom when these guards were necessary for security reasons and did not impair appellant's right to confer with his counsel.

E. Whether appellant was deprived of due process when the trial court merely told the jurors they could start thinking about their opinion as to the guilt of appellant and his codefendants.

F. Whether the punishment imposed by Penal Code section 209 constitutes cruel and unusual punishment under the Eighth Amendment as applied to the states by the Fourteenth Amendment in light of the seriousness of the crime of kidnapping for ransom where the victim suffers bodily harm and the fact other states have similar or more severe penalties than the one imposed by section 209.

* * * * *

MOTION TO DISMISS

I
THE APPEAL SHOULD BE DISMISSED AS JURISDICTION DOES NOT LIE PURSUANT TO 28 U.S.C. SECTION 1257(2)

Appellant has asserted jurisdiction lies under 28 U.S.C. 1257(2); however, jurisdiction does not lie under this provision.

Pursuant to 28 U.S.C. section 1257(2) this Court has jurisdiction, by appeal, in any case where a final decision of the highest state court has sustained a state statute on federal constitutional grounds. Huffman v. Pursue, LTD. 420 U.S. 592, 605; Cohen v. California, 403 U.S. 15, 18.

Although appellant attacked California Penal Code section 209 on federal and state constitutional grounds in the California Court of Appeal, that court never considered whether the statute violated the federal constitution. Rather, it only upheld the statute under the California Constitution. (AOB Appendix pp. 24-28.)

Moreover, as the California Supreme Court summarily denied appellant's petition for hearing, there is no evidence that court considered the validity of Penal Code section 209 on federal constitutional grounds. (AOB Appendix p. 31.)

Consequently, as the California courts never considered the validity of section 209 under the United States Constitution, jurisdiction does not lie under section 1257(2). Thus, the purported appeal under that section should be dismissed.

MOTION TO AFFIRM

Assuming arguendo this Court determines the appeal should not be dismissed, it still should affirm the decision of the California Court of Appeal, Fourth Appellate District, Division Two, as appellant has raised no substantial federal question on this appeal. (See Arguments II-VII infra.)

II

APPELLANT'S CONTENTIONS AS TO SUFFICIENCY OF THE EVIDENCE FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION AS THERE IS AMPLE EVIDENCE SUPPORTING HIS CONVICTION UNDER CALIFORNIA PENAL CODE SECTION 209

Appellant initially contends his convictions for kidnapping for purposes of ransom where the victims suffered bodily harm (Penal Code section 209) are so totally devoid of evidentiary support as to constitute a violation of due process. (AOB 14.) However, his contentions as to the sufficiency of the evidence fail to raise a substantial federal question as there is ample evidence supporting his convictions under Penal Code section 209. One appealing from a state court conviction must establish his state court conviction was based on a total lack of relevant evidence to show his conviction constituted a denial of due process. Thompson v. City of Louisville, 362 U.S. 199; Adderly v. Florida, 385 U.S. 39, 44; Vachon v. New Hampshire, 414 U.S. 478.

A. There is Ample Evidence Supporting Appellant's Convictions for Kidnapping for Purposes of Ransom

The form of Penal Code section 209 in effect at the time of appellant's conduct provided

as follows:

> "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm." (Emphasis added.)[2]

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2. On February 18, 1972, the California Supreme Court found the death penalty to be cruel or unusual pursuant to Article I, section 6 of the California Constitution. Thus, appellant could not have been punished by death in this case. People v. Anderson, 6 Cal. 3d 628.

The death penalty has recently been reenacted in California in accord with this Court's decision in Furman v. Georgia, 408 U.S. 238, and Article I, section 27 of the California Constitution which provides the death penalty shall not

In this case evidence was presented Meier and Montoya were seen in a white Chrysler on October 14, 1973. (RT 1917-1924.) On October 15, 1973, after Meier and Montoya had returned to the parking lot following their trip to the phone booth on Mt. Vernon, Walters was seen in the parking lot of the shopping center at Arrowhead and Baseline. (RT 665-669, 680-682, 740, 763-764, 685, 833-834, 499-500.)

Thereafter, Walters was seen walking around the lot and looking around. He also

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be deemed cruel or unusual punishment within the meaning of Article I, section 6 of the California Constitution. See Pen. Code, §§ 209, 190.2.

Penal Code section 209 now provides:

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death in cases in which any person subjected to any such act suffers death, or shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers bodily harm, or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where no such person suffers death or bodily harm."

looked at the basket containing the money and continued walking around and watching the area around him. After some further walking, he looked at the basket, picked up the bag, opened it, checked its contents, and walked to a white Chrysler. (RT 834-840, 501-502.) After passing the trunk of the white Chrysler, he looked around, briskly walked to the back of the vehicle, put the bag in the trunk, closed the trunk, and drove off. (RT 840-841.)

Moments later Meier and Montoya were seen walking toward their Roadrunner, Meier was seen signaling to Montoya, and they left the area. (RT 844-848.)

When Walters was arrested, the money was found in the white Chrysler, and a map with the intersection of Baseline and Arrowhead circled was also found in the Chrysler. (RT 1000-1005, 1031, 1040, 1230-1233, 1124-1125.)

Drawing reasonable inferences from the evidence, it is clear Walters was intimately involved in the kidnap plot. The evidence reasonably supports the conclusion the white Chrysler Walters was seen in was the exact same car Meier and Montoya had been seen in a day earlier and that Walters was thus involved with and associated with Meier and Montoya.

The conclusion that he was part of the kidnap plot is further substantiated by his furtive movements around the parking lot before finding the money. Instead of innocently walking around the lot and walking up to the bag in the cart with casual curiosity, he walked around the lot, looked all around, and stared at the basket with the bag of money.

Moreover, the fact Meier and Montoya were at the lot earlier; left the lot for awhile after the money had been dropped off by Mrs. Ponce; returned to the lot; watched Walters

remove the money, but did nothing; and Meier signaled Montoya after the money had been removed; clearly indicates Walters was part of the plot and Meier and Montoya were counting on him to perform his part of the plan.

Finally, the fact Walters had a map with a circle around the intersection where the money was picked up indicates he was going to that spot with the intent to retrieve the ransom money.

Although appellant raises some arguments to this evidence by alluding to his testimony at trial and by pointing to some other evidence in his favor, these arguments are nothing more than an attempt to have this Court reweigh the evidence. Thus, they should be rejected.

Because Penal Code section 209 proscribes kidnapping for ransom or the aiding and abetting of such conduct and there is ample evidence to support appellant's convictions under 209, his convictions do not constitute a denial of due process.

B. There is Ample Evidence to Support the Jury's Finding Appellant Was Guilty of Kidnapping for Ransom Where the Victim Suffered Bodily Harm

Appellant next suggests his convictions for kidnapping for ransom where the victims suffered bodily harm cannot stand as there is no evidence he was involved in the murder of the victims. (AOB 15.) However, Penal Code section 209 does not require each defendant inflict bodily harm on the victims in order for the allegation to apply.

Rather, the plain meaning of the statute is that when any victim suffers bodily harm during a kidnapping proscribed by section 209, all persons committing the kidnapping may be convicted of kidnapping for ransom where the victim suffers bodily harm.

Accordingly, as there is ample evidence appellant was involved in the kidnappings and that the victims were murdered during the kidnappings, the jury properly convicted appellant of kidnapping for ransom where the victims suffered bodily harm.

C. Conclusion

Therefore, as there is ample evidence to support appellant's convictions under Penal Code section 209, his contentions as to the sufficiency of the evidence do not raise a substantial federal question.

* * * * *

III

A DEFENDANT HAS NO FEDERAL CONSTITUTIONAL RIGHT TO HAVE A PROSECUTOR DISCLOSE EVIDENCE FAVORABLE TO HIS DEFENSE TO A GRAND JURY

Appellant next contends the prosecutor should have disclosed exculpatory evidence to the Grand Jury. (AOB 16.) This contention is without merit.

Although the California Supreme Court has held a District Attorney aware of evidence reasonably tending to negate guilt has a duty to inform a Grand Jury of the existence of such evidence (Johnson v. Superior Court, 15 Cal. 3d 248), there is no federal case ever holding a defendant has a federal constitutional right to have a prosecutor disclose evidence favorable to a defense to a Grand Jury.

United States v. Ash, 413 U.S. 300, relied on by appellant does nothing to support his contention here. That case merely holds there is no right to counsel at a photographic lineup. Id. at 321. Even assuming there is some federal constitutional right to have the prosecutor disclose exculpatory evidence to the Grand Jury, appellant's contention here still would fail.

Although he contends the prosecutor should have disclosed evidence as to another man who picked up the ransom money earlier in the day, the other man who picked up the money had nothing to do with the case against appellant. He merely happened to walk by the phone booth and took the money apparently believing someone had lost it or accidentally left it there. There was absolutely no indication he had anything

to do with the kidnapping plot. Accordingly, the prosecutor had no duty to present this evidence to the Grand Jury. (See also AOB Exh. B, pp. 9-10.)

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IV

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS BECAUSE THE TRIAL COURT DID NOT GRANT HIS REQUEST FOR A CHANGE OF VENUE

Appellant next contends he was deprived of due process because the trial court did not grant his request for a change of venue. (AOB 17.) See Sheppard v. Maxwell, 384 U.S. 333. However, this contention is also meritless.

Initially, it must be pointed out that the newspaper articles appellant complains about were not the type which prejudiced the community against him so that he could not have selected a fair jury.[3]

Although there were many articles about the case, nearly all of the articles were published during the period from October 16, 1973, until October 23, 1973, and related primarily to the search for the Sanchez family and McGrail, the location of their bodies, the arrest of Meier, Montoya, and Walters, and the burial of the victims. Thereafter, with the exception of an interview with Meier's mother and an article about Montoya slashing his wrist, the articles only reported the proceedings directly relating to the case, and did so in a concise and factual manner.

None of the articles expressed the views of the newspapers as to the guilt of Walters, nor did they consist of editorial comments which could have inflamed the passions

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3. Appellee has reviewed the newspaper articles about this case which were considered by the court below and are on file in the San Bernardino County Clerk's Office.

and prejudices of the residents of San Bernardino County against appellant. See Murphy v. Florida, 421 U.S. 794, 802. Compare Sheppard v. Maxwell, supra at 339-342, 345-349.

In the Sheppard case, for example, there were numerous articles with banner headlines such as "'Why Don't Police Quiz Top Suspect'", or "'Kerr (Captain of the Cleveland Police) Urges Sheppard's Arrest.'" Id. at 340-341.

Furthermore, unlike newspaper articles in California cases such as Maine v. Superior Court, 68 Cal. 2d 375, 386 and People v. Tidwell, 3 Cal. 3d 62, 70, there were no advance reports in the newspapers any of the defendants had confessed to the crimes. See also Murphy v. Florida, supra at 799.

Moreover, there was no evidence either the prosecutor or defense counsel repeatedly spoke to local newspapers about the case and were quoted by the papers regarding their views on the case. Compare Maine v. Superior Court, supra at 386.

In addition, it should be noted jury selection in the case did not begin until January 23, 1974 (VT 1)[4] and nearly all the articles about the case had appeared three months earlier during the period from October 16, 1973, to October 23, 1973. Thus, it was likely many persons in the county had forgotten about the case by the time the jury was selected and that any passions which may have been inflamed by the articles would have cooled. See Murphy v. Florida, supra at 802.

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4. VT refers to the Reporter's Transcript of the voir dire proceedings in this case.

Thus, while there was extensive coverage of the crime and some of the subsequent proceedings, the coverage was not so unusually widespread, inflammatory, sensational, or continuing, to the extent Walters could not have received a fair trial in San Bernardino County. See Murphy v. Florida, supra. (See also AOB Exh. B, pp. 10-11.)

Moreover, the record in this case shows Walters selected a jury that had not been inflamed by the media, but could give him a fair trial. The jurors who actually rendered the verdicts in this case were Verna Swift, Corrine Lemke, Jimmie Enciso, Nadine Bengel, J. S. Chappell, Marie Uray, Harold Lemaster, Gilbert Granados, Betty Miller, Evelyn Vanalstine, Ida Williams, and Natalie Olsen.[5]

Verna Swift testified she had read headlines about the case in the newspapers, but did not follow the articles or pursue the matter any further. She also stated she did not feel she had acquired any preconceived notion about the case which could affect her judgment. (VT 57, 216.) In addition, she stated she did not know the locations or witnesses involved in the case. (VT 143-145.)

Corrine Lemke was a member of the first panel of potential jurors in the case. When members of the panel were asked to indicate if they read anything about the case, she did not

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5. Melva Gundlach and Sharon McCullough were originally selected for the jury, but had been excused for personal reasons before the jury rendered the verdicts. (CT 92, 196-201, 224; VT 1291-1354.)

indicate she had read anything about the case. (VT 24, 53-64, 83-84, 100-102, 114-132.) In addition, she testified she would decide the case solely on the evidence she heard in the courtroom. (VT 146-147, 224-226.)

Jimmie Enciso was a member of the second group of potential jurors in the case. He also did not indicate he had read anything about the case. He further testified he did not know the locations or witnesses in the case and would render his decision based on the evidence. (VT 364, 382-385, 425-436, 559, 562, 565.)

Marie Uray stated she had not read anything about the case, and did not know any of the witnesses or places involved in the case. (VT 508.)

Harold Lemaster was also a member of the second group of potential jurors and never indicated he had read anything about the case. (VT 365, 382-385, 425-436.) He also testified he had no knowledge of the names or places involved in the case, and there was no reason why he could not be fair and impartial. (VT 660, 669-670.)

Nadine Bengel testified she only read the crimes had occurred and did not read the names of the parties to the crime or about the facts in the case. (VT 719.) She further testified she could be completely impartial. (VT 719.)

Mr. Chappell was a member of the third panel of potential jurors and did not indicate to the court he had read anything about the case. (VT 672-673, 695-705, 711-742.) In addition, he testified he could be completely fair and impartial to everyone involved in the case. (VT 871.)

Betty Miller testified she had not read or heard anything about the case. (VT 672-674, 695-705, 711-742, 936-937.)

Natalie Olsen was a member of the third panel of potential jurors and did not indicate she had read anything about the case. (VT 672, 675, 695-705, 711-742.) She also told the court the names and places in the case were not familiar to her. (VT 963-964.)

Ida Williams testified she had only read about the deaths of the victims and stated she could still give appellant a fair trial. (VT 996-997.) She further stated she would not judge appellant by what she had read in the paper, but only on the evidence in the case and the applicable law. (VT 997, 1013.)

Evelyn Vanalstine was a member of the second supplemental panel used for selection of alternates. (VT 1101-1103.) She did not indicate she had read or heard anything about the case. (VT 1121-1128.) Moreover, she stated the names and places involved in the case were unfamiliar to her and she could be fair and impartial. (VT 1204-1205.)

Gilbert Granados likewise was a member of the second supplemental panel used for selection of alternates. (VT 1101-1103.) He also did not indicate he had read anything about the case. (VT 1121-1128.) Moreover, he informed the court he could be fair to all persons involved in the case. (VT 1219.)

From the record it is thus evident only three of the twelve jurors read anything about the case, and those three jurors did not do any extensive reading about the matter. Also, there was nothing to indicate any of the jurors could not impartially and fairly consider appellant's guilt or innocence. The fact the jury fairly

decided the case is also evidenced by the fact Walters was acquitted of the four counts of murder he was charged with.

Thus, it is clear the jury finally selected was eminently fair and was not prejudiced because of any news coverage of the case. See Murphy v. Florida, supra at 800-801.

In addition, the fact there were articles in the paper around October 23, 1973, concerning the burial of the victims and donations in honor of the victims does not mean appellants could not have obtained a fair trial in the county.

In Maine v. Superior Court, supra at 385, there was evidence a substantial amount of money was raised to aid the victims of a crime in a county with a population of 51,000. While the California Supreme Court considered this to be a factor in determining whether venue should be changed, the court also stated that not all sympathy for victims of crimes is necessarily evidence of antipathy to the perpetrators of the crime. Instead, the court noted that in that case venue should have been changed because of community bias in light of the extensive amount of charitable aid by the small population of the county.

By contrast in the case at bar, although there were about 3200 people at the funeral and some donations were made; this does not show the entire county was prejudiced against appellants since San Bernardino County has a population of 684,072. Calif. Gov. Code § 28020. Accordingly, the fact some sympathy was expressed for the victims does not mean appellant could not have obtained a fair trial in the county.

In addition, other factors in this case support the decision of the court below in not changing venue. First, while the victims

may have had friends in the county, there was no showing below they were either prominent or popular citizens in the community who were known by a majority of the population in the county. Compare Maine v. Superior Court, supra at 385; Fain v. Superior Court, 2 Cal. 3d 46, 49; People v. Tidwell, supra at 73 (popular teenagers murdered).

Furthermore, appellant's crimes took place in a large metropolitan area rather than a small rural community. San Bernardino County has a population of over 684,000 and is ranked 7th out of the 58 counties in California in population. Gov. Code § 28020. In addition, the west end of the county is closely related and connected to the urban population of Riverside County and Los Angeles County. Thus, it was highly unlikely the average person in the county would be prejudiced or biased because they personally knew the victims or appellant or because of personal knowledge of the case. See People v. Hathcock, 8 Cal. 3d 599, 620. Compare People v. Tidwell, supra at 70, 74-75; Maine v. Superior Court, supra at 385-386 (small populations where population knew victims and were intimately aware of and involved in the case).

Finally, it is clear from the record Walters did in fact receive a trial free from undue publicity. A protective order was issued by the court before trial (CT 43-46), and there was no evidence anywhere in the record that there were distractions during the trial by the presence of communications media in the courtroom. Compare Sheppard v. Maxwell, supra; Estes v. Texas, 381 U.S. 532. See Murphy v. Florida, supra at 798.

Therefore, it is clear from the facts and law set forth above that Walters did in fact receive a fair trial in this case. Accordingly, his contentions here regarding a change of venue are without merit and must fail.

V

THERE IS NO EVIDENCE IN THE RECORD APPELLANT WAS PRECLUDED FROM CONSULTING WITH HIS COUNSEL DURING THE TRIAL

Appellant next contends he was deprived of due process because armed guards by the counsel table prevented him from conferring with his counsel during the trial. (AOB 20.)

At the outset it should be noted there was nothing improper about having guards in the courtroom in light of the fact appellant and his two codefendants were charged with four murders and four kidnappings for ransom. Obviously, the three men together posed a substantial security threat to others in the courtroom and in the courthouse.

Moreover, although a defendant clearly has a constitutional right to consult with his counsel during a trial (see Geders v. United States, ___ U.S. ___, 44 U.S.L.W. 4420, March 30, 1976), there is nothing in the record to indicate appellant and his attorney could not consult or that they could not consult with each other to the extent appellant could not receive a fair trial. In addition, no confidential communications between appellant and his attorney were overheard by any guards, nor were any of his statements to his counsel used against him.

It should be noted the record indicates the guards were standing in reasonable proximity to appellant only because of the physical layout of the courtroom rather than because of any contrived plan to intercept any communications. (See VT 12-14; RT 494-496.)

Finally, the lack of merit of appellant's contention is substantiated by the fact

his attorney never objected on this ground below. Instead, the objections on this ground were made by the attorney for one of the codefendants. (RT 494-496; VT 12-14; CT 66.)

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VI

APPELLANT WAS NOT DEPRIVED OF DUE PROCESS MERELY BECAUSE THE TRIAL COURT TOLD THE JURORS THEY COULD START THINKING ABOUT THEIR OPINION AS TO THE GUILT OF APPELLANT AND HIS CODEFENDANTS

Appellant also contends the trial court improperly told the jury they could start forming their opinion about the case before hearing defense counsel's argument. He suggests this statement was, in effect, a direction to the jury that appellant and the codefendants were guilty and that nothing defense counsel could say could possibly make a difference. (AOB 20.)

California Penal Code section 1122 provides:

> "The jury must also, at each adjournment of the court before the submission of the cause to the jury, whether permitted to separate or kept in charge by officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them."

At the close of the prosecution's opening argument in this case the court admonished the jury as follows:

> "THE COURT: We will take our afternoon recess at this time.
>
> "Of course, as I have told you before, the admonition becomes increasingly important each time, each day we go along.

"While you have heard all the evidence, there is still the summation by the defendants and there is still the final argument by the People, and then the instructions by the Court, so while you can be thinking about your opinion certainly you shouldn't voice it to anyone and, of course, you should not discuss it with anyone; don't even mention it and don't let anybody talk to you at all about this case.

"Refrain from reading the newspaper, listening to the television or the radio, or anything that in any way would be similar or that in any way would erase from your mind the evidence you have heard in this court, or confuse the evidence you have heard in this court.

"While I say that you can start forming an opinion,you are not to express this to anyone. Don't even discuss it among yourselves.

"You are not to talk about this case with even your fellow jurors until it is finally submitted to you for your final determination, and you will then deliberate.

"Until that time, remember not to discuss it with anyone.

"We will be in recess until 9:30 tomorrow morning.

"THE BALIFF: This Court will be in recess until 9:30 tomorrow morning." (RT 3122-3123.)

While the court's admonishment to the jury was not in the exact language of section 1122, there still was no constitutional error. The court told each juror, as it had many previous times during the trial, not to discuss his opinion with any other members of the jury since they had not, as yet, heard closing argument by the defense. Thereafter, the court told the jury they could start forming an opinion about the case, but should not express it to anyone.

By this statement the court did not intend to tell the jury to reach conclusions about the case before it had heard closing argument by the defense. Rather, it merely informed the jurors they could start thinking about their conclusions in the case.

Certainly, this admonishment could not amount to constitutional error since each juror presumably had started sorting out the evidence and thinking about the ultimate verdicts he would render in the case after having heard all the evidence in the lengthy trial. The court's admonishment did not tell jurors to disregard the closing defense arguments, but realistically assumed the jurors had started sorting out the evidence and thinking about their verdicts, and informed them to be careful not to express their own ideas on the case to others while thinking about their ultimate opinion of the case.

Contrary to appellant's suggestions, this admonishment could not be construed as informing the jurors they should reach conclusions about appellant's guilt before hearing closing defense arguments. Moreover, the jurors in this case were certainly not so stupid or ill-advised that they would have interpreted the admonition in this matter. As has been observed about jurors in another vein:

> " . . . many attorneys tend to underestimate the stability of a jury. A juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box." People v. Long, 38 Cal. App. 3d 680, 689. (See also AOB Exh. B, p. 18.)

Even assuming arguendo this Court feels the admonition by the court amounted to error, a reversal still is not required since appellant suffered no prejudice.

In the instant case there has been no showing the incorrect admonishment in any manner affected the verdicts rendered by the jury. Indeed, it would be impossible to show any prejudice resulted since the court on later occasions admonished the jury to not form or express an opinion about the case. (RT 3196, 3227-3228, 3351.)

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VII

THE PUNISHMENT IMPOSED BY PENAL CODE SECTION 209 DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

California Penal Code section 209 imposes the punishment of life imprisonment without the possibility of parole upon a person convicted of kidnapping for ransom where the victim suffers bodily harm. Appellant is now facing a term of life without possibility of parole pursuant to section 209 and contends the punishment imposed by the statute constitutes cruel and unusual punishment within the meaning of the Eighth Amendment as applied to the states by the Fourteenth Amendment. (AOB 21.)

In determining whether a sentence constitutes cruel and unusual punishment courts consider whether the sentence imposed shocks the conscience, is disproportionate to the offense, or offends evolving notions of decency. See Trop v. Dulles, 356 U.S. 86, 101; Newman v. State of Alabama, 503 F.2d 1320, 1330 fn. 4 (5th Cir. 1974). Applying these standards here, it is clear the punishment imposed by section 209 is not cruel and unusual.

Initially, it is evident the punishment imposed is not disproportionate to the gravity of the crime and this is not cruel.

The crime of kidnapping for purposes of ransom where the victim suffers bodily harm is, no doubt, one of the most serious and heinous of all crimes. Kidnapping for ransom involves the capture, and forcible confinement of a person against his will. It is always an act of premeditation and deliberation which is carried out solely to satisfy the greed of the perpetrator. Where bodily harm is also involved the crime is also brutal in nature and often even sadistic.

Indeed, kidnapping for ransom where the victim suffers bodily harm is conceivably more heinous than many homicides which may accidentally be carried out in the heat of passion, in a mistaken belief they were justified, or because of some irrational and bizarre beliefs by the perpetrator.

Furthermore, kidnapping not only places the victim in danger as does a murder, but it also involves anguish and stress upon the family of the victim and places them, law enforcement officers, and innocent bystanders in danger when they are required to deliver a ransom to a spot designated by the kidnappers and/or may make attempts to rescue the victims from the clutches of the kidnapper or kidnappers.

Thus, it is clear kidnapping for ransom where the victim also suffers bodily harm is perhaps the most serious offense proscribed by the California Penal Code. Accordingly, life without possibility of parole is certainly appropriate in this case where the kidnapping was carried out for purposes of ransom and the victims did suffer bodily harm, in this case, death. See In re Maston, 33 Cal. App. 3d 559.

Moreover, it cannot be said the punishment is contrary to common notions of decency and thus unusual. Arizona, Nevada, and West Virginia also impose a punishment of life without parole. (AOB Exh. L pp. 48-56.) Furthermore, the punishment cannot be deemed unusual to the extent it is much more severe than the punishment imposed by other states. Many states impose the death penalty for kidnapping under the circumstances present here. Thus, the punishment imposed here is not unusual.

Accordingly, the punishment imposed by Penal Code section 209 does not constitute cruel and unusual punishment within the meaning of the Eighth Amendment as applied to the states by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, we respectfully request the appeal be dismissed or affirmed.

Respectfully submitted,

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